

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA L. SIMMONDS
Claimant

VS.

CAPITOL CONCRETE PRODUCTS, INC.
Respondent

AND

WAUSAU UNDERWRITERS INS. CO.
Insurance Carrier

Docket No. 1,051,740

ORDER

Claimant requests review of the October 7, 2010 preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders (ALJ).

ISSUES

The ALJ denied claimant's request for ongoing medical care and reimbursement of medical expenses after finding the claimant's left knee injury did not arise out of and in the course of his employment. The ALJ relied upon the diagnosis offered by Dr. Wilcox when she concluded that "[c]laimant's present left knee condition is caused by the baker's cyst that was present prior to the incident on April 15, 2010. Claimant's present condition is not caused by the incident of April 15, 2010 but rather by the baker's cyst that preexisted this incident."¹

The claimant requests review of the ALJ's Order arguing that it should be reversed. Claimant maintains there is nothing in Dr. Wilcox's report to support the ALJ's conclusion that claimant's present knee condition was caused by the baker's cyst that was present prior to the incident on April 15, 2010. To the contrary, claimant contends the MRI which was taken after her work-related accident revealed a torn meniscus and that evidence,

¹ ALJ Order (Oct. 7, 2010) at 2.

coupled with claimant's testimony supports her contention that she sustained an accidental injury arising out of and in the course of her employment on April 15, 2010.

Respondent argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

There appears to be no dispute that claimant was suffering from the effects of what had been diagnosed as a baker's cyst in her left knee before April 15, 2010. That condition led her to seek treatment from her primary care physician on April 9 and April 12, 2010. She had complained of a swollen and painful knee with numbness and tingling. According to claimant, by April 15, 2010 her condition had improved and she felt better than she had in weeks.²

Then, while outside on a break she was surprised by a co-worker who unexpectedly poked her in the side. As she stood up and tensed, that her leg tightened, and her left knee twisted and popped.³ Claimant worked the balance of her work day, and the next day (Friday) and again on Monday, the 19, 2010.

On Tuesday, April 20, 2010 claimant called her primary care physician and asked to be seen. Those office notes of her call indicate "her left knee is much worse than at her office visit. **She hyperextended her leg yesterday, now she can barely walk and her foot is swollen. She is requesting an appointment with ortho today.**"⁴ Claimant was referred to Dr. Howard L. Wilcox and seen that same day. Dr. Wilcox evaluated claimant and diagnosed a likely ruptured popliteal cyst, likely secondary to a meniscal difficulty with the knee.⁵ Interestingly, Dr. Wilcox's records mention nothing about the April 15, 2010 accident. It merely indicates that claimant has had "pain that was at times severe and was constant, with some swelling in her knee. This has been going on for one and a half to two weeks."⁶

² P.H. Trans. at 12.

³ *Id.* at 7.

⁴ *Id.*, Cl. Ex. 2 at 12 (Cotton O'Neil Clinic phone note dated April 20, 2010).

⁵ *Id.*, Cl. Ex. 2 at 11 (Dr. Wilcox's Apr. 20, 2010 report at 2).

⁶ *Id.*, Cl. Ex. 2 at 10 (Dr. Dr. Wilcox's April 20, 2010 report at 1).

Dr. Bradley Poole, of the same orthopaedic group, saw claimant on May 10, 2010. Dr. Poole's records do mention an episode of hyperextending her knee at work. He reviewed her MRI and notes that there is a "degenerative split extending through to the inferior surface" of her knee.⁷ Dr. Poole recommended claimant weigh her treatment options of cortisone injections or a partial medial meniscectomy.⁸ His report makes no findings about the causal connection between claimant's accident at work and her present condition.

The obvious question in this claim is whether claimant's present complaints and her need for treatment have any causal link to the event she describes occurred at work on April 15, 2010. There is no apparent dispute that the accident occurred as claimant says. Moreover, there is no dispute that in the days and weeks before that accident claimant was experiencing ongoing problems of pain and numbness in her knee, along with a serious painful episode on April 9, 2010 that drove her to seek treatment from an emergency room.

The ALJ concluded that claimant had failed to prove that her knee complaints were causally connected to the event at work. In doing so, she seized upon the language within Dr. Wilcox's report that reflect a diagnosis of "likely ruptured popliteal cyst, likely secondary to a meniscal difficulty in the knee."⁹

Claimant contends as follows:

Apparently, Judge Sanders did not carefully review the report of an MRI of the left knee done April 22, 2010, wherein the impression is described as: "1. Oblique tear posterior horn meniscus. Possible grade 1 of the medial collateral ligament. 2. Small joint effusion and Baker's cyst".¹⁰

Claimant goes on to say that "[t]here is nothing in the report by Dr. Wilcox that supports the conclusion by ALJ Sanders that Ms. Simmond's, "present left knee condition is caused by the baker's cyst that was present prior to the incident on April 15, 2010."¹¹ Claimant maintains that the medical evidence, coupled with her own testimony as to the acute onset of new symptoms after her April 15, 2010 accident more than support her contention that her present complaints are causally connected to the accident she sustained on April 15, 2010.

⁷ *Id.*, Cl. Ex. 2 at 5 (Dr. Poole's May 10, 2010 report at 1).

⁸ *Id.*, Cl. Ex. 2 at 6 (Dr. Poole's May 10, 2010 report at 2).

⁹ *Id.*, Cl. Ex. 2 at 11 (Dr. Wilcox's April 20, 2010 report at 2).

¹⁰ Claimant's Letter Brief (filed Oct. 13, 2010).

¹¹ *Id.*

Respondent, on the other hand, argues that there is no evidence to show that the “poking” incident caused claimant’s present need for medical treatment and surgery.¹²

K.S.A. 44-501(a) states in part: “In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant’s right to an award of compensation by proving the various conditions on which the claimant’s right depends.” K.S.A. 44-508(g) finds burden of proof as follows: “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.” The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.¹³

Although there is no apparent dispute that claimant was involved in an incident that caused her to become startled, the causal connection between her present complaints and that accident are less than clear. The first orthopaedic physician she saw makes no reference to any event where her leg was hyperextended. And Dr. Wilcox’s report is not entirely clear regarding the physical source of claimant’s complaints. He indicates that her diagnoses is “likely ruptured popliteal cyst, likely secondary to a meniscal difficulty within the knee.” There is nothing in this record to suggest that the baker’s cyst was *caused by* claimant’s April 15, 2010 accident. To the contrary, claimant had been diagnosed with the cyst before the accident, on April 9, 2010.

But Dr. Wilcox’s report simply does not make it clear if the “meniscal difficulty” was caused by the cyst or caused by the accident. The ALJ apparently construed his report to mean the former, rather than the latter.

Dr. Poole’s report was no more illuminating, although he noted the April 15, 2010 event but his report does not attribute her “degenerative split” in the medial meniscus to her work-related accident. Only claimant makes this assertion. And while a claimant need not always present medical testimony to substantiate his or her claim¹⁴, the ALJ was certainly not persuaded by claimant’s testimony given the nearly identical nature of claimant’s complaints both before and after April 15, 2010.

Like the ALJ, based upon this record as it is presently developed this Board Member is simply not persuaded that claimant’s present complaints and need for treatment are

¹² Respondent’s Brief at 4 (filed Nov. 2, 2010).

¹³ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

¹⁴ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

causally connected to her April 15, 2010 accident at work. Accordingly, the ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁵ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated October 7, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
James W. Fletcher, Jr., Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

¹⁵ K.S.A. 44-534a.